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February 20, 2007

Mark Shonkwiler, Esq.
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5440
The Media Fund

Dear Mr. Shonkwiler,

This supplemental response is submitted on behalf of The Media Fund ("TMF") to the brief of the Office of General Counsel ("OGC"). OGC has recommended that the Commission find probable cause to believe that TMF violated various provisions of FECA from its activities prior to Election Day in 2004. TMF submitted a Response to the Brief of the General Counsel in MUR 5440 on January 12, 2007. In its response, TMF argues that OGC erred in its assertions that TMF was a political committee subject to FECA limits, that TMF violated the provisions of FECA with regard to "contributions" and "expenditures," and that TMF's major purpose was to influence a federal election.

On February 7, 2007, the Commission released a Supplemental Explanation & Justification ("E & J") of its decision declining to issue a new rule regarding political committee status under the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). As set forth below, the statements made by the Commission in this E & J bolster TMF's response and compel a finding of no probable cause in this MUR. First, the E & J confirms that the solicitation rule which OGC uses as support for its conclusion that TMF raised "contributions" was new and was not in effect for the 2004 cycle. Second, the E & J confirms that the principles purportedly established in MURs closed in December 2006 are not precedent applicable to conduct that occurred in 2004.

A. The Revised Explanation and Justification Establishes That the Commission Rules Are New and Can Therefore Only Be Applied Prospectively.

In the E & J, the Commission stated that, in November 2004, it adopted a new regulation explaining when an organization's solicitations generate "contributions" under the Act, bringing

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certain I.R.C. §527 political organizations within the scope of FECA. Specifically, in the E & J, the Commission states that, “[o]n November 23, 2004, following an extensive rulemaking process, the Commission adopted *new* regulations to ensure that organizations that participate in Federal elections conduct their activities in compliance with Federal law.” 72 Fed. Reg. 5596 (Feb. 7, 2007) (clarifying 11 C.F.R. §100) (emphasis added). The Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68056, 68056-63 (Nov. 23, 2004) (“2004 Final Rules”) took effect on Jan. 1, 2005.

The Commission repeatedly states in the revised E & J that this regulation is new. In fact, the revised E & J states twenty-eight times that these rules are new. While the E & J clearly states that these regulations were not in effect until they were adopted on November 23, 2004 (the E&J for §100.57 states it was effective January 1, 2005), OGC uses these “new” solicitation provisions in its Brief in analyzing TMF’s activities, all of which pre-date the adoption of the rules.¹

Despite the fact that the FEC has twice published an E & J stating that these regulations are new, OGC advocates their retroactive application to TMF. This is fundamentally unfair and a violation of due process. While the Commission argues strongly in the revised E & J that it is important for the regulated community to have clear guidance, the retroactive application of a new rule could not possibly be said to provide guidance to regulated entities regarding their past activity. TMF’s activities in 2004 must be governed by then-existing regulations which did not include any provision such as §100.57. Thus, the supplemental E & J provides additional support for the Commission to find no probable cause that TMF violated any provision of the Act.

B. The Use of MURs Closed After TMF Conduct as Guidance in this Case is Improper.

The E & J also makes clear that FEC enforcement matters involving other respondents and decided after TMF’s activities are not relevant as precedent for the regulated community, other than as a guide to their future conduct. In fact, while OGC attempts to use these 2006 settlements in closed enforcement actions retroactively in the TMF MUR, the revised E& J itself says unequivocally:

“These documents [in the 527 settlements] should guide organizations *in the future* as they formulate plans and evaluate their own conduct so they may determine whether they must register and report with the Commission as political committees.” (emphasis added)

E & J, Federal Register, Vol. 72, No. 25 at 5604 (February 7, 2007).

At the time TMF was planning its activities for 2004, it had available for review the existing FEC regulations, advisory opinions, court decisions, legislative history and FEC closed

¹ The only support cited by OGC for its application of this solicitation standard is *Survival Education Fund*. As set forth in our Response Brief at Section III(A)(2), that case does not support OGC’s analysis.

enforcement actions that had been made public at that time.² In these prior enforcement actions that were reviewed by TMF, communications that were indistinguishable from TMF's were found *not* to be express advocacy. In fact, in one recent case, the Commission found that no express advocacy existed in an ad that was far more explicitly related to an election than any TMF ad. In MUR 5158, the Commission determined there was no express advocacy in ads which featured then-Governor Bush, referenced "Election Day," and asked readers, "Should the next **president** be a candidate of the gun lobby? Should he be someone of whom the NRA has said that if he is elected, they'll be working right out of the **Oval Office**? That's Governor Bush's record." *Emphasis added.* Fed. Election Comm'n, MUR 5158, First General Counsel's Report at 22 (Oct. 24, 2003).

The MURs cited in the supplemental E & J by OGC were all settled and made public in December 2006. They do not establish a basis for the Commission to retroactively apply new §100.57 to TMF's activity in 2004. Nor do they establish a basis for the application of §100.22(b) express advocacy to TMF.

The attempt to use these MURs as legal precedent applicable to conduct that occurred prior to their publication is fundamentally unfair, especially when there were MURs on the public record in 2004 in which communications indistinguishable from those made by TMF, were found by the Commission not to contain "express advocacy."

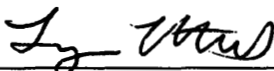
Clearly then, the supplemental E & J provides examples of present and future policy on the part of the Commission – to apply this new guidance retroactively is tantamount to changing the rules in the middle of the game. The relevant guidance for the Commission's consideration here are closed MURs made available to the public in 2004 (at the time TMF was conducting their activities) that were cited in the brief, not those that were made available to the public in 2007, and, accordingly, under those precedent, the Commission should find no probable cause to believe that any violations occurred.

² This E & J has the most expansive statement of the precedential value of MURs that the FEC has ever asserted. Since it has only been recently that the regulated community could research closed MURs in a meaningful fashion (when they were put on-line in 2004), this assertion that closed MURs should be viewed as precedent is also new. Nonetheless, TMF did attempt to research closed MURs before engaging in activity in 2004. Set forth in our response to the brief at pages 19 to 21, are summaries of the FEC MURs that were on the public record in 2004. It is these MURs that were available to TMF in 2003 and 2004 that fairly set forth the law applicable in 2004, not the ones settled by the FEC in 2006, prior to findings of probable cause, with respondents who did not concede that the OGC view of the law set forth in their conciliation agreements was even accurate. The legal assertions in these MURs have certainly not been tested in Court.

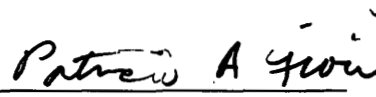
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C. Conclusion


For the reasons stated in our Brief filed on January 12, 2007, we respectfully request that the Commission find no probable cause that TMF violated the Act and close the file in this matter. We believe that the additional reasoning provided herein, as a result of the Commission's own supplemental E & J, even more forcefully compels this conclusion.

Respectfully submitted,


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